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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

No. 803

WILSON McCARTHY AND HENRY SWAN, TRUSTEES OF THE DENVER AND RIO GRANDE WESTERN RAILROAD COMPANY, A CORPORATION, AND THE DENVER AND RIO GRANDE WESTERN RAILROAD COMPANY, A CORPORATION,

Petitioners,

vs.

E. E. BRUNER,

Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO GRANTING OF WRIT OF CERTIORARI

The Petition for Writ of Certiorari Is Insufficient.

While counsel for petitioners are to be commended for the brevity of the petition in this case, nevertheless, the petition is not sufficient. No facts appear from the petition showing "the matter involved." The general statement that questions of negligence and contributory negligence are involved is insufficient to present the matter to the Court without at least a brief reference to the facts. No

facts appear in the petition and from the petition itself, the Court could not possibly arrive at any conclusion as to what the issues were.

No facts are stated to which any rules of law appear to be held applicable or inapplicable. Without some facts showing how the questions of negligence and contributory negligence arose, the Court could arrive at no conclusion from reading the petition.

Unless this Court read the opinion of the Supreme Court of Utah, it would have no idea as to what issues were involved. The petition is not sufficient to serve its intended purpose.

Record Incomplete — Entire Charge of Court Not Given.

The petition should be denied because of an improper and insufficient Record. On Page 8 of the brief of petitioners in this Court, it is said that the Supreme Court of Utah erred in holding as a matter of law that respondent was not guilty of contributory negligence, and that as a matter of law, petitioners were guilty of negligence.

The Record does not support this contention.

The only instructions of the Court to the jury appearing in the present Record are Instructions Nos. 6, 9, and 20 on Pages 10 to 12, inclusive, and Instructions 15 and 5 on Pages 117 and 118.

On Page 118 of the Record it is specifically stated that the Record on appeal in the lower court did not contain "Defendants' requested Instruction No. 5."

There appears on Page 10 of the Record—"whereupon the court instructs the jury in writing and the case is argued to the jury". Other than the instructions before referred to, what "the instructions in writing" were, does not appear.

Issues of Negligence and Contributory Negligence Were Submitted to the Jury.

On page 8 of the brief of petitioner it is said that the issue of negligence was not submitted to the jury, but that the Supreme Court of Utah held as a matter of law that petitioner was guilty of negligence.

It is true that the Supreme Court of Utah did say that as a matter of law, it appeared that the defendant trustees were guilty of negligence. Nevertheless, the question of negligence was submitted to the jury, as was the question of contributory negligence.

In the decision of the Supreme Court of Utah, (R. 103-104), it is said: "The defendants urge that the jury was not propertly instructed on the issue of contributory negligence. * * * It is contended that the various instructions did not CORRECTLY submit this factor to the jury."

From this it is clear that the question of contributory negligence was submitted as a fact to the jury.

Just how contributory negligence was submitted to the jury does not appear from this Record.

Instruction No. 6 (R. 10-11) deals with the question generally.

Defendants' Requested Instruction No. 15 appears on R. 117-118. This deals with contributory negligence. By this instruction the Court said: "Contributory negligence, however, does operate to reduce the amount which plaintiff would be entitled to recover, if you find that he is entitled to recover anything."

Certainly, this is inconsistent with the claim on Page 8 of the petition that contributory negligence was determined as a matter of law.

We are not unmindful of the statement of the Utah Supreme Court that contributory negligence does not appear in the case. However, the issue was submitted to the jury by Instruction 15.

Also, on Page 118, Defendants' Requested Instruction No. 5 appears. By this instruction it is said, "Contributory negligence is the failure of a person to exercise care under the circumstances for his own safety." Following this Instruction appear the words "Given George A. Faust, Judge". (R. 118)

Under this same Page 118 it appears that the Record in the Court below did not contain this Instruction No. 5.

This, however, cannot avail the petitioners here anything.

Petitioners cannot ask the Supreme Court of the United States to grant certiorari upon an incomplete or a jumbled Record.

The Supreme Court of Utah did not hold as a matter of law that Bruner was not guilty of contributory negligence.

What the Supreme Court did say was—"We must conclude that the Record does not show contributory negligence." (R. 107)

The Court also said there was no evidence to show that the method of doing the work by Bruner was dangerous. (R. 106-107)

The effect of the decision of the Supreme Court of Utah is merely to say that contributory negligence did not appear as a matter of law from the whole record before it.

That contributory negligence was submitted to the jury appears from the statement, (R. 103-104), by Mr. Chief Justice Wolfe to the effect that the defendants contended that the issue of contributory negligence was not PROPERLY submitted to the jury.

Without the Record and without the instructions showing how it was submitted, petitioners are without standing in this Court on the question of contributory negligence.

This leaves the remaining question of whether the defendant trustees were guilty of negligence as a matter of law.

Here, again, the Record is silent. The trial Court submitted the issue of negligence to the jury.

Instruction No. 6 (R. 10 and 11) might be taken to bear on both negligence and contributory negligence.

In Instruction No. 20 (R. 12) the jury was told—"If you find the plaintiff is entitled to recover, you may award him such damages", etc. While the Record is meager, it shows that the issue of negligence or the right to recover was submitted to the jury.

But here, again, on this petition for Writ of Certiorari the Supreme Court of the United States cannot be expected to act in view of the condition of the record and without showing what instructions were in fact given to the jury.

That the question of negligence was submitted to the jury again appears in that portion of Instruction No. 15 on page 117. While that instruction starts out dealing with contributory negligence, it does contain this language: "If under the instructions given you, YOU find that the defendants were negligent and that such negligence was the proximate cause of the injury", etc., clearly it cannot be said in view of this instruction that the jury were not permitted to pass on the question of negligence.

It appears from the decision of the lower court at R. 112 that the trial Court read a portion of the Federal Employers' Liability Act to the jury, being that portion relating to the right to recover for "negligence".

It appears from the opinion at R. 112 that the defendant trustees complained about the charge in that they "were charged with negligence in failing to keep their equipment and road bed in proper condition."

The Court said this was not so. But, the point is that the question of negligence was submitted to the jury.

If it was not submitted properly, the petitioners should have complained at the time, but certainly they cannot now properly come before the Supreme Court of the United States on a Record which does not show what the charge to the jury was, and ask upon the uncertain and incomplete Record, that the Supreme Court grant certiorari.

It appears from the opinion R. 113, that there was an instruction to the jury on negligence in which the jury was told in substance that their conception of negligence under the state law should not govern "because this case was governed by Federal law rather than state law."

What has just been said certainly negatives the idea that the issue of negligence was not submitted to the jury but was found by the Court in this case as a matter of law.

There is a great difference between the Supreme Court of Utah saying that negligence appeared as a matter of law and the trial Court so charging the jury.

It does appear in this case that Petitioners were negligent and Respondent was not. However, Petitioners got all that they were entitled to in the lower court.

The issue of negligence was submitted to the jury. The finding was against them.

The issue of contributory negligence was submitted to the jury; the finding was against them.

In each instance the trial Court upheld the finding of the jury. The Supreme Court of Utah upheld the jury and the lower court.

With such an incomplete Record and with the Record silent as to just how the issues of negligence and contributory negligence were submitted to the jury, we submit that the petition on this ground alone should be denied.

The Petition for Writ should likewise be denied for lack of merit.

Statement of the Case.

This is an ordinary action to recover damages for personal injuries suffered by an employee of the petitioners herein. The action was brought under the Federal Employers' Liability Act, 45 USCA, Sections 51-59; 35 Stat. 65 as amended; 36 Stat. 291 and 53 Stat. 1404.

The provisions of said act were properly applied by the Supreme Court of the State of Utah and its decision herein is not inconsistent with the applicable decisions of the Supreme Court of the United States.

No new question was decided by the Supreme Court of Utah, and its decision does not constitute an extreme or an unusual precedent.

The petition for writ of certiorari is insufficient and should be denied. There is nothing involved herein which necessitates a review by this Court.

Respondent, the plaintiff below, brought suit under said act to recover damages for the loss of a leg below the knee. He alleged that his injury was caused by the negligence of one, Colosimo, a hostler in the employ of the petitioners, in placing two locomotives coupled in motion without receiving from respondent the customary signal, and without

giving warning of the movement by bell or whistle, as a result whereof respondent was thrown upon the tracks beneath the rolling wheels of one of said engines and his left leg was run over and cut off a short distance below the knee.

The trial court submitted the case to the jury under the doctrine of comparative negligence, although there was no evidence of plaintiff's contributory negligence. The jury returned a verdict awarding damages to respondent in the amount of $30,000.00, without reduction on account of contributory negligence. A motion for a new trial was made by petitioners and by the trial Court denied. On appeal to the Supreme Court of Utah judgment on this verdict was affirmed.

Petitioners there contended that the safety rules set forth in plaintiff's complaint (R. 4-5) were not applicable to the circumstances of the case and that the question of contributory negligence had been improperly presented to the jury. The Court held these contentions to be immaterial because, without regard to the safety rules, the undisputed evidence disclosed, as matter of law, that the petitioners were negligent and that respondent was not guilty of contributory negligence.

Petitioners argue that this holding, in effect, denied them the benefits of trial by jury and is inconsistent with decisions of this Court. Wherein said holding is inconsistent with any of the decisions of this Court, cited by petitioners, is not indicated. In the latest of these cases (*Brady* v. *Southern Railroad Company*, 64 S. Ct. 232, 88 Law. Ed. Adv. Op. 189, decided December 20, 1943) this Court upheld a decision of the Supreme Court of the State of North Carolina wherein that Court held, as a matter of law, that no negligence on the part of defendant was shown and that hence the trial Court erred in submitting the case to a jury.

The Court stated at 88 Law Ed. Adv. Op. 192:

> "When the evidence is such that without weighing the credibility of the witnesses there can be but one reasonable conclusion as to the verdict, the Court should determine the proceeding by non suit, directed verdict or otherwise in accordance with the applicable practice without submission to the jury or by judgment notwithstanding the verdict."

And as pointed out by petitioners (petition and brief, page 2) "the rule must work both ways."

The evidence in the case at bar was not in conflict and the Supreme Court of Utah determined that, as matter of law, the petitioners were liable and that respondent was free from contributory negligence, and hence the assigned errors in regard to safety rules and instructions on contributory negligence could not have been prejudicial to the petitioners.

This ruling does not require or involve a construction of the Federal Employers' Liability Act, but merely an appraisal of the evidence to determine whether negligence or contributory negligence was present in the case. The power of appellate Courts to make such an appraisal is well established in our jurisprudence.

This Court in *Union Pacific Ry Co.* v. *McDonald*, 152 U. S. 262, 36 L. Ed. 434, 14 S. Ct. 619 (1893) stated:

> "Nor did the Court err in saying to the jury that the disputed issue was the question of damages. Looking at all the facts there was an entire absence of any just ground for imputing contributory negligence to the plaintiff. If the jury had so found, the Court could properly have set aside the verdict as being against the evidence. Upon the question of negligence, the case is within the rule that the Court may withdraw a case from the jury, altogether and 'direct a verdict for the

> plaintiff or the defendant, as the one or the other may be proper, where the evidence is undisputed or is of such a conclusive character that the Court in the exercise of a sound judicial discretion, would be compelled to set aside a verdict returned in opposition to it.' Delaware L. & W. R. Co. v. Converse, 139 U. S. 469, 35 L. Ed. 213, and authorities there cited; Elliott v. Chicago M. & St. P. R. Co., 150 U. S. 245, 37 L. Ed. 1068; Anderson County Comrs. v. Beal, 113 U. S. 227, 28 L. Ed. 966."

See also *Baltimore & P. R. Co.* v. *Mackey*, 157 U. S. 72, 39 L. Ed. 624, wherein this Court found that as a matter of law there was no contributory negligence in order to avoid the effect of a claimed erroneous instruction on that subject, and *Choctaw O. & G. R. Co.* v. *Holloway*, 191 U. S. 334, 48 L. Ed. 207, 24 S. Ct. 102, wherein this Court decided that the defendant was guilty of negligence as a matter of law in order to avoid the effect of a claimed erroneous instruction on that subject.

Under the foregoing we believe it is apparent that this is not such a case as comes within the rules laid down by this Court for the granting of petitions for writ of certiorari.

However, we sincerely submit that the Supreme Court of Utah correctly decided this case on its merits and that in view of the undisputed facts the petitioners were guilty of negligence and respondent was free from contributory negligence as matter of law.

Argument.

The Supreme Court of the State of Utah correctly held (1) that respondent was not guilty of contributory negligence; and (2) that the petitioners were guilty of negligence as matter of law.

The Respondent Was Not Guilty of Contributory Negligence.

During the shift when respondent was injured he, as hostler's helper, and Colosimo, as hostler, had been working together (R. 27) in delivering and servicing engines assigned to road duty and recovering incoming engines. The track on which respondent was injured ran east and west. (R. 29) As this track extends west from the round house it reaches the cinder pits first, then the sand house, then the coal chute. (R. 29) It was dark at night when the accident occured. (R. 33)

Engine 1149 was at the cinder pits when Engine 1182 was brought from the roundhouse and coupled onto it. Both engines were facing east. (R. 31) The fire was cleaned on Engine 1182 at the pits. (R. 31) During this operation respondent and Colosimo discussed the movements to be made by the engines. (R. 31) Colosimo told respondent to sand and coal 1182 and that he would coal 1149. (R. 31) Respondent then took a position on the running board of 1182 and when the fire cleaning operation was completed, he, with lighted latern, gave Colosimo, who was in the cab of 1149, a back up signal. (R. 32) Colosimo thereupon sounded the whistle on the 1149 to indicate that he had received the signal (R. 82, 63) and then started the engines backward, and when the 1182 reached a position where sand could be placed in the sand dome, respondent gave the stop signal with his lantern and Colosimo brought the engines to a stop. (R. 32) When the sanding operation was completed respondent again gave the back up signal (R. 33) and Colosimo thereupon backed the engines westward (R. 33) and stopped them when the 1149 reached a point where its tender was beneath the coal chute. (R. 33) After he, Colosimo, had placed coal in the tender of 1149 he started the engines backward, without receiving a signal from respondent and without ascertaining where respondent was,

and without giving any warning signal by bell, whistle, or otherwise.

After the completion of the sanding operation, respondent went back into the cab of 1182 and checked the fire and water and shut off the blower. (R. 33) He then got off the engine on the north side and proceeded back to the rear of the tender. He stepped upon the left rear foot board and took hold of the grab iron which extends horizontally across the back of the tender. He intended to pass over the draw bar and climb up the ladder to the top of the tender. (R. 34, 41) As he was in the act of passing over the draw bar, the engines were unexpectedly started with a sudden jerk by Colosimo as aforesaid and he was thrown onto the tracks where his left leg was run over necessitating amputation below the knee. (R. 41, 42)

There was no conflict in this evidence.

The petitioners' contention that respondent was guilty of contributory negligence is based upon their conclusion that of the five possible ways respondent could have used to gain a position on top of the tender of 1182, he chose the only dangerous, awkward and clumsy way.

This argument is basically unsound in that it rests upon the false premise that the way chosen by respondent to gain his position on the top of the tender of 1182 proximately contributed to the cause of his injury, when as a matter of fact this act was not a causitive factor in the occurrence complained of.

Petitioners' argument also ignores the fact that there is an entire absence of proof that the way pursued by respondent was dangerous or unusual or that the other suggested methods were safe. The argument in its final analysis is nothing but counsel's conclusion that there was inherent danger in the way pursued by respondent and complete

safety in the other methods or ways suggested. Each of the five methods was perfectly safe so long as the engines remained still, as they were when respondent started to pass over the draw bar to the ladder. None was safe in the event the engines were moved suddenly and without warning. The danger was borne of the negligent act of Colosimo in starting the engines without signal or warning, it was not kin to the way pursued.

It is interesting to note that the hostler Colosimo did not use any of the ways or methods suggested by petitioners in gaining his position on the tender of 1149 when it was stopped at the coal chute. (R. 82, 98, 99)

The case of *Mathews* v. *Daly West Mining Company*, 27 Utah 193, 75 Pac. 722, is illustrative of the proposition that the danger here was borne of the negligent act in starting the engines and not of the way pursued by respondent. In that case the plaintiff was an employee in an ore mill. The superintendent told him that the mill would be shut down for one-half hour and for plaintiff to look the machinery over while it was down. In making this check the plaintiff discovered a loose cap. He procured a candle and wrench and then laid crosswise over the belt in order to tighten the cap. While thus situated the mill was suddenly and unexpectdly started and the plaintiff injured. It was contended by the defendant that the safe method of tightening this cap was to lie down underneath the belt while someone else held a candle and that plaintiff thus could have tightened the cap without being exposed to danger, even though the mill was placed in operation while the task was being performed. The testimony, however, indicated that the method used by plaintiff, as well as the method suggested by appellant, was safe as long as the mill was not in operation. There was evidence that it was customary to give a warning when the mill was about to start and that

no such warning was given. Defendant contended that inasmuch as the plaintiff knew of each of the methods mentioned and knew that he could have tightened the loose cap with safety by lying prone underneath the belt, he was guilty of contributory negligence. The Court states:

> "They rely upon the well-settled rule of law that when the servant knows, or by the exercise of ordinary care can ascertain, that there are both safe and dangerous ways by which he can perform his duties, if he voluntarily chooses to pursue one of the ways that is dangerous, he assumes the natural and ordinary risk incident to the way he has chosen, * * *"

and continuing:

> "It is also well settled that the negligence of the master is not among the risks so assumed by the servant. Therefore when the servant, in the discharge of his duties, is in a position which is, under the conditions which then exist, naturally safe, but is suddenly made dangerous by the negligence of the master, and the injury to the servant is immediately caused thereby, the master is liable."

The Court observed that the position of plaintiff did not become dangerous until the mill was suddenly and unexpectedly started, and, in commenting on certain decisions cited by appellant, stated:

> "In neither of these cases was it shown, as in the case at bar, that the position of the servant, which before the accident was safe, was at the time of the injury suddenly made dangerous by the negligent act of the master. It is clear that these cases are not in point."

It clearly appears from the testimony that the way or method taken to gain a position on top of the tender is entirely up to the individual. Colosimo testified:

Q. And when the helper is in the cab he gets down on one side, from one gangway to the other?

A. Yes sir. Some of them—they have so many ways of working—some of them crawl up over the gates and get into them.

Q. It is more or less up to the helper what he does?

A. Yes sir.

Q. You do not pretend to tell the helpers how they should do this part of their work?

A. No sir.

Q. Nobody ever pretended to tell you how to do it when you were a helper?

A. No sir. (R. 99, 100)

Petitioners rely solely upon photographs of the two engines, Exhibits 3 (R. 62A), A (R. 34A) and F (R. 74A) to support their contention that respondent selected the most dangerous way of getting up on the tender of 1182, and from these exhibits without the aid of testimony they create these imaginary dangers. Certainly it does not appear from these photographs that the way chosen by respondent was either dangerous, clumsy or awkward. An examination of the exhibits discloses that there is a foot board on either side over the rails at the rear of the tender of 1182, and that above each foot board is a metal stirrup. For respondent to get to the top of the tender it was only necessary to do the following: Step onto the foot board at the north rear corner and grasp the hand hold which extends horizontally across the entire rear end of the tender approximately eight inches above the pin lifter, then place left foot in the iron stirrup immediately above the foot board; next, place the right foot and body weight upon the draw bar, and take hold of the ladder with either hand, the ladder being about two feet beyond the draw bar and immediately over the south rail. Finally, climb up the ladder to the top of the tender.

Petitioners refer to this method as crawling or clambering over the draw bar. It could much more fairly be described as a stepping from the foot board and stirrup onto the draw bar and thence to the ladder.

Petitioners make the statement on pages 12 and 13 of their brief that there is no horizontal hand hold across the rear of the tender of 1182. In view of Exhibits 3, A and F it is rather difficult for us to reconcile this assertion. The bar above the pin lifter extends completely across the back of the tender. What is its purpose? Without question it is a hand hold installed for use by workmen crossing over the draw bar.

The uncontradicted evidence is to the effect that it was common practice amongst petitioners' employees to pursue the course followed by respondent in passing over the draw bar to the ladder of 1182, under the circumstances disclosed by the record here. Respondent testified (R. 75-76):

> Q. I call your attention to the heavy iron rod, the top iron rod that runs above the pin lifter.
>
> A. Yes.
>
> Q. What do you use that for?
>
> A. It is to hold onto. We use them when we are out in the yards switching, to hold onto, when we are riding around. That is for the purpose of taking hold of it, with your hands.
>
> Q. You may state whether or not, in the course of your employment as a hostler, or a hostler's helper and fireman, you have occasion to cross from one side to the other of an engine coupled to a tender, and to pass over the drawbar?
>
> A. Yes, many times I have had occasion to. I did so many times. It is a common practice to get off and go up that way.

We submit that the way chosen by respondent was usual and safe, was one commonly taken, and that hand holds

were afforded for the entire course, but here again we suggest that it was not the way chosen which caused the injury, but the sudden, unexpected and negligent starting of the engines.

It is rather interesting to note that the railroad company was evidently unable to produce from among its vast number of employees any witness who would testify that the way pursued by respondent was unusual, awkward and dangerous, nor did the railroad make any attempt to prove the existence of any rule, regulation or instruction which prohibited such a movement or described it as unsafe or dangerous, and likewise petitioners failed to prove the existence of any custom or practice among its employees which in any way restricted employees from passing over the draw bar when their duties required them to move from one side of a coupled car or tender to another.

Respondent submits that the natural conclusion from this lack of evidence on the part of the defendant is that the movement is neither dangerous, awkward, clumsy or unusual, and in view of the fact that there is positive evidence to the effect that the movement is usual and common, petitioners' contentions to the contrary should be disregarded.

Four other possible routes are suggested by counsel. The first two are apparently suggested without having in mind the testimony of respondent:

> Q. In order for you to give any signal or communication whatsoever to the operator of an engine, where would you naturally get?
>
> A. I would get up on top of the tank, and in this particular instance in order to be where I should be in order to make the proper spot to take coal, *to be in a position for spotting and taking coal both, that is the proper place to be, for that move, up on the back end of the tank of 1182.* (R. 73)

There are, however, two complete answers to this contention: (1) The record does not disclose that any such order was ever given by Colosimo; and (2) the failure of Colosimo to anticipate the breach of such order, even if one had been given, did not in whole or in part cause the injuries sustained by respondent, and was never relied upon by respondent, his counsel or the Supreme Court of Utah as a ground of negligence in this case. Petitioners here merely set up a straw man.

The record clearly indicates that Colosimo never did order respondent to stay on engine 1182 in the sense that he was not to dismount from it. He only told respondent what to do, not how to do it. The complete record on this is as follows:

Colosimo on direct examination:

> Q. Now, will you state what was said between you and Mr. Bruner at that time?
>
> A. I told him that the back engine, 1149, was already sanded, and the 1182 needed to be sanded, and I told him to sand the 1182 and coal 1182 and I would coal 1149 as we went by the coal chute.
>
> Q. Was that all you said to him at that time?
>
> A. Yes, I believe so. I told him for him to sand 1182 and stay on her and coal her, and at the same time I would take care of the 1149. (R. 81)

On cross examination:

> Q. You never gave Mr. Bruner any instructions as to how he could get in and out of the engine, or what he should do, other than to work with you in this movement?
>
> A. No sir.
>
> Q. You never told Mr. Bruner how he should get down?

A. Down from the gangway onto the other?

Q. You did not tell him to go out of the window, up on top of the cab, on to the tender; you did not do that at all, did you?

A. No sir.

Q. The fact of the matter is, that was just up to him?

A. Yes sir. (R. 99)

On redirect examination:

Q. Mr. Colosimo, at the time you talked with Mr. Bruner, back at the cinder pit, about what you were going to do, did you say anything to Mr. Bruner as to where he should be and stay?

A. I just told him to stay on the 1182. That is what I told him, just to stay on the 1182, and I would take care of the 1149. (R. 102)

On recross examination:

Q. All you meant by that was that you would take care of 1149, and Bruner would take care of 1182?

A. Yes sir. (R. 102)

That this was the meaning conveyed to respondent is confirmed by his testimony:

He had come up to Engine 1182 and told me that I would have to take sand on the Engine 1182; that both engines needed coal, and he would coal on Engine 1149, and for me to take coal on 1182. (R. 31)

The Supreme Court of Utah on this point stated:

"Nor does the evidence show that Colosimo ordered the plaintiff to stay on Engine 1182. True Colosimo did testify that "I just told him to stay on 1182. That is what I told him, just to stay on 1182 and I would take care of 1149." But it is clear that what he meant

> by this was merely that plaintiff should confine his work to 1182 and Colosimo would take care of 1149; for in response to the question: "All you meant by that was that you would take care of 1149 and Bruner would take care of 1182?," Colosimo answered: "Yes, sir." This interpretation of this statement is further borne out by the remainder of Colosimo's testimony." (R. 106)

But let us assume that Colosimo ordered respondent not to dismount from Engine 1182 at any time. How can this aid the petitioners on the question of negligence imputed to them by the conduct of their servant Colosimo? The negligence plead and relied upon by respondent, and upon which this action is based, was the failure of Colosimo to give a warning that the engines were to be moved and his failure to hold the engines still until he received a proper signal from respondent. The duty violated by Colosimo, giving rise to the cause of action herein, was not the duty to anticipate what respondent would do or fail to do. It was the duty resting upon him to hold said engines still until he received a proper signal from respondent, and to give a proper warning before placing said engines in motion. It seems apparent that the sudden, unexpected movement of the engines under the circumstances disclosed by the record, was highly dangerous to respondent, and would have been dangerous to anyone working on the engines and not expecting or anticipating the movement.

Petitioners complain that respondent dismounted from Engine 1182, and contend that this was a dangerous act. May we suggest that if respondent had been off the engine when it started he would not have been injured. His injuries resulted from being on the engine when it was negligently placed in motion. Certainly any instruction given by Colosimo to respondent requiring respondent to take care

of 1182 while Colosimo did likewise with 1149 would not and should not relieve Colosimo of his duty to give proper warning and to hold said engines still until he received a proper signal from respondent. This admitted violation of duty on the part of Colosimo was relied upon by respondent and was relied upon by the Supreme Court of the State of Utah, and the existence of that duty and its breach by Colosimo is established by uncontradicted evidence.

It is interesting to note that the petitioners have never questioned the sufficiency of the proof to establish the existence of this duty and its violation by Colosimo, and have never contended that there was any evidence to the contrary.

The practice in the yards at Grand Junction was to move engines only on signal. The hostler's helper giving a signal by lantern which was then acknowledged by a whistle signal from the hostler. (R. 25, 26) Respondent testified that these signals were in effect at the time and place of the injury and that he "always used them and worked by them." (R. 26)

At the time the engines were moved from the cinder pits, respondent first gave a back up signal and Colosimo acknowledged this signal by whistle. The engines were stopped at the sand house by signal from respondent, and before the engines were moved a proper signal was given by him to Colosimo. This shows beyond any doubt that these two men were moving the engines by signal only, and that each was relying upon the signals. Colosimo not only placed the engines in motion without a signal from respondent and without giving any warning signal whatsoever, but also without knowing where or in what position respondent was at the time. Both respondent and Colosimo testified to the

foregoing facts. There is no dispute in the evidence. Could negligence be any more clearly established?

On the matter of petitioners' negligence, the Supreme Court of the State of Utah stated:

> "If the crew member operating an engine were to move it without signal from his co-worker when he knew the latter was engaged about the train at a point where he could not be seen, we might expect yard accidents to multiply greatly. There is also no dispute concerning the fact that Colosimo did not get a signal from his helper, the plaintiff, to back up so that 1182 could be coaled; nor did he give a whistle signal. It is also admitted that this sudden start caused the plaintiff to fall to the tracks. The hostler and his helper customarily moved the trains by signals between themselves. Colosimo started the train without either getting a signal from the plaintiff or giving a whistle or bell signal himself. It was dark and he could not see the plaintiff nor did he know where the plaintiff was. Moving the train under these circumstances was negligence even apart from the safety rules." (R. 110)

Subsequent to the decision of the Supreme Court of Utah in this case, this Honorable Court has had occasion to pass upon the question of negligence on the part of a railroad company arising from the violation of a company rule, providing that the bell must be rung "when an engine is about to move."

One of the rules relied upon by respondent here was the company's safety rule No. 30 which provided, in part, as follows:

> "The bell must be rung when an engine is about to move." * * * (R. 4)

In the case referred to *Tennant* v. *Peoria & Pekin Union R. Co.*, 88 L. Ed. Adv. Op. 322, decided January 17, 1944, this Court stated:

"As to the proof of negligence, the court below correctly held that it was sufficient to present a jury question. In view of respondent's own rule that a bell must be rung 'when an engine is about to move,' it was not unreasonable for the jury to conclude that the failure to ring the bell under these circumstances constituted negligence. This was not an operation where bell ringing might be termed unnecessary or indiscriminate as a matter of law. Cf. Aerketz v. Humphreys, 145 U. S. 418, 420, 36 L. Ed. 758, 759, 12 S. Ct. 835; Toledo, St. L. & W. R. Co. v. Allen, 276 U. S. 165, 171, 72 L. Ed. 513, 516, 48 S. Ct. 215. The engine had remainded stationary for several minutes, during which the engineer saw Tennant disappear in the direction of the subsequent engine movement. Still not knowing the precise whereabouts of Tennant, the engineer then caused the engine and cars to make an extended backward movement. Such a movement, without a warning, was clearly dangerous to life and limb."

Respondent believes that this decision substantially supports the decision of the Supreme Court of Utah in this case.

Certainly the jury had no fact question to pass upon. There was no controversy about the locomotives being stationary at the time plaintiff attempted to board 1182, nor the fact that the engines were placed in motion without a signal or warning. With only one inference and that of negligence on the part of Colosimo to be drawn from the undisputed facts in this situation, clearly, the trial Court and the Supreme Court of Utah committed no error in holding that the petitioners were guilty of negligence as matter of law.

Conclusion.

The petition for writ and the record are incomplete and insufficient.

This case involves no construction of a Federal Act. The decision of the Supreme Court of Utah was upon no new point of law. This is merely an ordinary action to recover damages for personal injuries and in which there is no dispute in the evidence and the negligence of petitioners and the lack of negligence of respondent is clearly established. The decision of the Supreme Court of Utah is not inconsistent with, but is in accord with the applicable decisions of the Supreme Court of the United States.

We respectfully submit that there are no grounds which justify the granting of the petition for a writ of certiorari in this case.

Respectfully submitted,

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